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THE DEFENSE OF "GOOD FAITH" UNDER SECTION 1983

London v. Florida Dep't of Health and Rehabilitative Services Div. of Family Services, 313 F. Supp. 591 (N.D. Fla. 1970)

Plaintiff, a case worker with the Florida Department of Health and Rehabilitative Services, was transferred to departmental offices in another county by the District Welfare Board as a result of complaints lodged against him by several county officials. The complaints arose because of manner and speech displayed by plaintiff in areas outside the realm of his employment.[1] On appeal, the State Merit System Council approved the transfer. Plaintiff commenced work in the county to which he had been transferred but shortly thereafter was dismissed from all employment. The Council upheld his dismissal, and plaintiff brought suit in the Northern District of Florida under 42 U.S.C. § 1983[2] alleging that both the transfer and the dismissal encroached on his first amendment freedoms.[3] The court held that plaintiff's first amendment rights were not violated by the transfer because he had a duty to "comply with the reasonable requirements and regulations established by the Department. One of these requirements was that employees not engage in community controversies that might disrupt the effective performance of their duty."[4] The court concluded that the Board in "good faith" believed that plaintiff's effectiveness as a case worker was impaired by these activities.

The conflict between constitutional rights and legitimate concern over the action of public employees has been a recurring theme in recent

1. London v. Florida Dep't of Health & Rehabilitative Services Div. of Family Services, 313 F. Supp. 591, 596 (N.D. Fla. 1970).

2. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. It was also alleged by plaintiff that the transfer and dismissal were the result of racial prejudice and based on arbitrary, capricious, and unreasonable Board action, and that on the appeal of his dismissal order he was denied the right of discovery. The court dismissed these contentions on the grounds that plaintiff failed to carry the burden of proving that racial prejudice was the motivating force of the Board's action, there was substantial evidence to support the transfer and dismissal, and plaintiff did not prove that he was "deprived of opportunity to test, explain or refute the testimony before the Council, or that he was not given a full and fair hearing."

4. 313 F. Supp. at 596.

years.[5] Accompanying this trend is the realization of the usefulness of § 1983 in seeking direct redress for harm sustained from wrongful state action.[6] Further, there is support for the position that when the Civil Rights Act of 1871 was adopted, Congress intended to eliminate the common law immunity from suit afforded judges, legislators, and, to a lesser extent, administrative officials under the Act.[7] The Supreme Court in *Tenney v. Brandhove*,[8] however, held that Congress did not intend to do away with *legislative* immunity in this area. The Court said: "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."[9] The lower courts were quick to extend this decision to the judiciary and governmental officials even though the Supreme Court had not ruled on the matter.[10] Subsequently, in *Monroe v. Pape*,[11] the Supreme Court held that

5 Although one has no constitutional right to public employment, Adler v. Board of Educ., 342 U.S. 485 (1952), constitutional protection is afforded to those persons whose exclusion is clearly arbitrary or discriminatory. Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956). Similarly, the government cannot attempt to achieve its objectives by methods which broadly stifle the fundamental liberties of its employees when these objectives can be more narrowly achieved. Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960). The employment of teachers may not be terminated, nor may teachers constitutionally be compelled to abandon their first amendment rights because of the exercise of freedoms guaranteed by the Constitution. Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 355 U.S. 589 (1967); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952). This constitutional protection is the same whether or not the person is tenured under state law. Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967). Likewise, it makes no difference if a dismissal occurs in the middle of a contract period or if the contract is simply not renewed for the next year. McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir 1968).

6. For a plaintiff to state a cause of action under § 1983 he must allege: (1) the conduct complained of was done under color of state law; and (2) this conduct subjected plaintiff to a deprivation of rights, privileges, or immunities secured to him by the Constitution and laws. *See* Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971); Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970); Jones v. Hopper, 410 F.2d 1323 (10th Cir.), *cert. denied*, 397 U.S. 991 (1969); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965); Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

7. Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953); Pickering v. Pennsylvania R. Co., 152 F.2d 240, 250 (3d Cir. 1945); Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285, 1295 (1953).

8. 341 U.S. 367 (1951).

9. *Id.* at 376.

10. Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958); Cuikas v. City of Mansfield, 250 F.2d 700 (6th Cir. 1957), *cert. denied*, 356 U.S. 937 (1958); Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955); Cawley v. Warren, 216 F.2d 74 (7th Cir. 1954); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953); Francis v. Crafts, 203 F.2d 809 (1st Cir.), *cert. denied*, 346 U.S. 835 (1953); McGuire v. Todd, 198 F.2d 60 (5th Cir.), *cert. denied*, 344 U.S. 835 (1952).

11. 365 U.S. 167 (1961).

it was not necessary to allege wilfulness to be successful in stating a cause of action under § 1983. The Court stated: "Section 1979 [42 U.S.C. § 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[12] This statement caused confusion in the lower courts over whether the Supreme Court had held that governmental immunity was no longer available in a suit brought under § 1983.[13] The question was resolved in *Pierson v. Ray*,[14] where the Court found that the question of immunity had not been presented in *Monroe* and therefore *Monroe* should not be read to foreclose the defense of good faith and probable cause. Rather, "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause."[15]

The importance of *Monroe* and *Pierson* in relation to the principal case is their view that common law defenses to torts are available under § 1983 and, in particular, that the doctrine of common law immunity is applicable. It has been said that no other doctrine has limited the effectiveness of § 1983 more than that of official immunity.[16]

The immunity the common law afforded administrative officials was not absolute but qualified.[17] Chief Judge Magruder of the First Circuit

12. *Id.* at 187.

13. Striker v. Pancher, 317 F.2d 780 (6th Cir. 1963); Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962); Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961).

14. 386 U.S. 547 (1967).

15. *Id.* at 556-57. The question in *Pierson* was whether the defense of "good faith and probable cause" put forth at the trial was a sufficient defense under § 1983. The court answered in the affirmative on the ground that the defense was "part of the background of tort liability." The Court was not addressing itself to the question of whether "probable cause" *and* "good faith" are required or whether "probable cause" alone would be a sufficient defense under common law immunity.

16. Note, *The Civil Rights Act of 1871: Continuing Vitality*, 40 NOTRE DAME LAW. 70 (1964).

17. The immunity which the common law conferred upon judges, legislators, and high ranking executive officials was an absolute immunity from suit for acts done within their authority. The immunity extended even to acts done negligently or maliciously. It was felt, however, that the reasons present for allowing an unqualified immunity to judges, legislators and governmental executives were not present with respect to administrative officials. A limiting factor imposed on the immunity of administrative officials was the requirement that the jurisdictional fact be present. This approach, some courts felt, imposed harsh results on those officials who were acting in their discretion and in good faith. These courts, therefore, drew a distinction between "discretionary" and "ministerial" officials. The test used to differentiate between the two was whether the law required that a particular thing be done without qualification. If so, then the official was ministerial and the immunity did not apply to unauthorized acts. This test was often difficult to apply. The courts, therefore, moved to a requirement of a showing of bad faith or malice in most instances. *See* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORDHAM L. REV. 130 (1943).

Court of Appeals in 1953 defined the qualified immunity doctrine in a concurring opinion in *Cobb v. City of Malden*:[18]

> Hence I take it as a roughly accurate generalization that members of a city council, and other public officers not in the exceptional category of officers having complete immunity, would have a qualified privilege, giving them a defense against civil liability, for harms caused by acts done by them in good faith in performance of their official duty as they understood it.[19]

For an administrative official to be able today to invoke a defense of immunity at common law it is necessary that he be acting in good faith. This same defense, following the reasoning of *Pierson*, would be available in an action brought under § 1983.

In employing the test of good faith, however, a difficulty arises over how the courts are to determine if "good faith" is present. Should the test be restricted only to what the official actually intended, his subjective state of mind, or may it also include an examination of the reasonableness of his actions in view of the surrounding circumstances? It is only after examining the result of a case in this area and the particular fact situation involved that it becomes clear which standard has been implicitly invoked. As the excerpt from *Cobb* suggests, the subjective method was employed in the developed common law.[20] The court in the principal case seems to be employing the same standard. An examination of cases closely analogous to the principal one indicates, however, that the courts are not in agreement as to which type of inquiry is to be utilized in connection with the statute.[21]

In *Smith v. Board of Education of Morrilton School District No. 32*,[22] the staff of an all black school was dismissed upon the opening of a new public school because only a few students chose to go to their school on the basis of a "freedom of choice" desegregation plan. The court, holding that the teachers stated a cause of action, said: "The use

18. 202 F.2d 701 (1st Cir. 1953).

19. *Id.* at 707.

20. *See generally* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORDHAM L. REV. 130 (1943).

21. *See* Pred v. Board of Public Instr., 415 F.2d 851 (5th Cir. 1969); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969); Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970); Bradford v. School Dist., 244 F. Supp. 786 (E.D. S.C. 1965), *aff'd*, 364 F.2d 185 (4th Cir. 1966).

22. 365 F.2d 770 (8th Cir. 1966).

of the freedom of choice plan, associated with the fact of a new high school plant, produced a result which the superintendent must have anticipated, despite his testimony that he 'rather guessed' that the Sullivan School would continue to operate."[23] The court employed an objective test to make its determination. Not only does it take into account what the superintendent thought, but it also examines the circumstances surrounding the origin of the dispute. However, the disadvantage of such an inquiry is the danger that the courts will engage in second-guessing the decisions of administrative officials.

An even more stringent standard was employed, perhaps inadvertently, in *McLaughlin v. Tilendis*[24] where former probationary school teachers brought an action under § 1983 against the superintendent of the school district and the elected members of the school board. They alleged that the discontinuance of their employment was based on their involvement in union activities. The district court dismissed the complaint on the ground that the first amendment confers no right to join a union. The Seventh Circuit Court of Appeals, reversing, said that teachers have the right of free association and any unjustified interference with this freedom violated the due process clause of the fourteenth amendment. The court then addressed itself to the qualified immunity enjoyed by these officials. The court said: "At best, defendants' qualified immunity in this case means that they can prevail only if they show that the plaintiffs were discharged on justifiable grounds."[25] The requirement stated here, by placing the burden of proof on the defendant, obviously goes further than the *Smith* formulation. The test in *Smith* placed the burden of proof on the plaintiff but allowed him to show that in light of the surrounding circumstances the defendant could not reasonably have been acting in good faith. The majority of cases do not place the burden of proof on the official.[26]

The courts have not always distinguished, even implicitly, between subjective and objective determination of good faith. In the case of *Freeman v. Gould Special School District*,[27] teachers whose contracts

23. *Id.* at 779.

24. 398 F.2d 287 (7th Cir. 1968).

25. *Id.* at 290-91.

26. Pred v. Board of Public Instr., 415 F.2d 851 (5th Cir. 1969); Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); James v. West Virginia Bd. of Regents, 322 F. Supp. 217 (S.D. W.Va. 1971); McGee v. Richmond Unified School Dist., 306 F. Supp. 1052 (N.D. Cal. 1969); Parine v. Levine, 274 F. Supp. 268 (E.D. Mich. 1967).

27. 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969).

were not going to be renewed brought an action under § 1983. The Eighth Circuit Court of Appeals, in upholding the district court's decision, said: "From the evidence, it appears the Board acted in good faith. . . ."[28] The majority opinion made clear that when the discretion of administrative officials is exercised in good faith and in accordance with the law the courts will not interfere. The court went on to say:

> School boards are representatives of the people, and should have wide latitude and discretion in the operation of the school district, including employment and rehiring practices. Local autonomy must be maintained to allow continued democratic control of education as a primary state function, subject only to clearly enunciated legal and constitutional restrictions.[29]

The court in the case of *Jones v. Hopper*[30] clearly required the use of an especially stringent subjective standard. This court, citing a 1905 decision,[31] held that the decision of an administrative agency is not a proper subject of review in a tort action unless fraud or equivalent wrongdoing is present. Most of the courts employing the subjective standard do not apply such a harsh principle from the plaintiff's point of view.[32]

From the foregoing analysis it becomes clear that a uniform, identifiable standard has not evolved in the application of the "good faith" doctrine of immunity in this area. The ambiguous character of the principle can no doubt be attributed to the application of common law immunity to § 1983 despite the specific policy considerations arising under that statute. Parochial definitions of common law immunity have made the legislative mandate that "[e]very person . . . shall be liable . . . ."[33] depend upon the forum in which the suit is brought.

Certainly the qualified immunity which these officials enjoy serves a useful purpose.[34] A statute which was created to protect an individual's

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28. *Id.* at 1160.

29. *Id.* at 1161.

30. 410 F.2d 1323 (10th Cir.), *cert. denied*, 397 U.S. 991 (1969).

31. Ward v. Board of Regents, 138 F. 372 (8th Cir. 1905).

32. Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied* 396 U.S. 843 (1969); Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970); Bradford v. School Dist., 244 Supp. 768 (E.D. S.C. 1965), *aff'd* 364 F.2d 185 (4th Cir. 1966); Seay v. Patterson, 207 F. Supp. 755 (M.D. Ala. 1962).

33. 42 U.S.C. § 1983 (1970).

34. Arguments in favor of immunity for administrative officials are: (1) the need to free officials from vexatious law suits; (2) the unfairness of asking a person to make a decision and then holding him liable for the decision he makes; (3) the delay that accompanies such law suits; and (4) the

constitutional and legal rights, privileges and immunities should, nevertheless, have a more definite interpretation. That interpretation should rest upon the uniform application of an objective test of "good faith." Aside from the obvious advantage of homogeneity, this approach would further the attainment of an equilibrium between § 1983 and the qualified privilege. This equilibrium would help each better to achieve its purpose with minimum impairment of the other.

For those who would argue that this outcome would result in a significant shift in policy for those courts which employ the subjective standard, it is to be remembered that both parties to litigation equally deserve the protection which the law affords. By the imposition of a subjective standard, the doctrine of qualified immunity is being advanced an unnecessary step at the expense of the remedy afforded by § 1983. The difficulty in proving that a person was not consciously acting in good faith imposes a harsh burden on a plaintiff.

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fear that constant suits would hamper the agency's efficiency. *See* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORDHAM L. REV. 130 (1943).